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Clyde H. Brockett Jr.

William Merlin

judgment action.[90] Perhaps the mixture of the two calls for a reexamination of the soundness of the rules of federal question jurisdiction;[91] if these rules are not sound, it is small wonder that confusion is created by the addition of declaratory procedure. In any event, the problems created by the clash between the two are deserving of attention and should be clarified by the courts.

FRANK M. GILLILAND, JR.

ARBITRABILITY UNDER COLLECTIVE BARGAINING AGREEMENTS

Under many collective bargaining contracts calling for arbitration of disputes, sooner or later a question has arisen whether the arbitrator has authority and power to arbitrate a particular issue. While this is obviously an oversimplification, it is a statement of the problem of arbitrability.[1] In voluntary arbitration[2] of labor disputes the question of the "scope of arbitration" may arise in either of two situations: (1) in the formulation of new contracts; or (2) in the disposition of grievances under existing contracts. This Note will consider only arbitration of the latter type.

While "Ninety-odd per cent of all collective bargaining agreements provide for arbitration as a final step in the grievance procedure . . ."[3] there is little agreement as to how much jurisdiction such provisions give to the

90. The *Harvard Law Review* suggests,—on precisely the page cited by Mr. Justice Frankfurter in the *Skelly Oil* opinion, 339 U.S. at 674—after pointing out the need for congressional classification, that the preferable rule might be "that a declaratory action seeking to test a defense is triable in the federal courts provided this defense would normally arise in answer to a complaint which itself would properly raise a federal question." Such a rule would achieve substantial conformity with principles applicable to conventional suits, and would make jurisdiction depend on the nature of the coercive action which the declaratory action has anticipated. *Developments in the Law—Declaratory Judgments*, 62 HARV. L. REV. 787, 803 (1949).

91. See Fraser, *Some Problems in Federal Question Jurisdiction*, 49 MICH. L. REV. 73 (1950).

1. Arbitrability is only one aspect of the broader problem of jurisdiction, albeit the most important aspect—the one most frequently confronting both courts and arbitrators. This Note will discuss the recent decisions and awards as to the types of questions held to be within the power and authority of the arbitrator to decide under collective agreements. For a discussion of the latitude allowed an arbitrator in reachng his decision—including the "arbitrability of arbitrability," see Scoles, *Review of Labor Arbitration Awards on Jurisdictional Grounds*, 17 U. OF CHI. L. REV. 616, 623-24 (1950). The two problems are closely related, but the scope of this Note has been arbitrarily limited so as to cover the specific topic in more detail. Also see U.S. DEP'T OF LABOR, ARBITRATION OF GRIEVANCES 11 (1946).

2. The Note will not take up compulsory arbitration. For discussion of this problem see Nurick, *Compulsory Arbitration of Labor Disputes Affecting Public Utilities*, 54 DICK. L. REV. 127 (1950); Roberts, *Compulsory Arbitration of Labor Disputes in Public Utilities*, 1 LAB. L.J. 694 (1950).

3. Braden, *Problems in Labor Arbitration*, 13 Mo. L. REV. 143, 167 (1948). See 5 P-H LAB. EQUIPMENT ¶ 60,017; Nix, *Arbitration Provisions in Union Agreements in 1949*, 70 MONTHLY LAB. REV. 160 (1950).

arbitrator. With the increasing number of decisions on the question of arbitrability, a body of precedents is being built up. However, the field of labor arbitration is so new, relatively, that there has been almost no crystallization of legal concepts which might be used.[4] Many writers have expressed views on what is (and should be) arbitrable; but not much authority has been cited for the different views; and little has been done to rationalize or reconcile the conflicts.[5]

The purpose of this Note is to seek a rational basis for the various decisions regarding arbitrability, in the hope of finding some degree of predictability. The writers feel that the importance of the subject to labor, management and society warrants considering not only the contract provisions, but also the types of disputes, in the hope of reaching valid conclusions on underlying concepts and principles in the decisions. There is no necessity for an extended discussion of the status of arbitration in collective bargaining. While the common law rule, accepted by the majority of the American jurisdictions, is that an agreement to arbitrate future disputes will not be enforced and is revocable at will by either party,[6] this has been changed by statute in many states.[7] By today, "Practically every conceivable issue that might arise in day-to-day industrial relations has been the subject of arbitration . . .,"[8] whether the contract is enforcable or not.

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4. Of course, some help may be derived from the field of arbitration generally; but query whether the probems are sufficiently similar to warrant turning to that field.

5. "[T]he conflicting court decisions mentioned in this dissent serve to emphasize the care necessary in preparing labor agreement, and point up the need to establish some standards to help the parties better understand what the agreement really means." *In re* The Lincoln Dairy Co. and Farmers Cooperative, Inc. *and* International Brotherhood of Teamsters, 14 L.A. 1055, 1059 (Arb. 1950); see Braden, *supra* note 3, at 145.

6. Note, 43 ILL. L. REV. 678, 679 (1948). The rule had its foundation in commercial arbitration, but has been extended to labor contracts. The reason for the rule is said to be that to enforce arbitration would be to oust the courts of jurisdiction and the parties could bargain away their legal rights and subject themselves and their rights to extrajudicial bodies. *But cf.* Rentschler v. Missouri Pac. R.R., 126 Neb. 493, 253 N.W. 694, 697 (1934). For discussions on the validity of arbitration provisions in labor and other contracts see Gregory, *The Collective Bargaining Agreement: Its Nature and Scope,* 1949 WASH. U.L.Q. 3, 14; Updegraff, *Arbitrations and Labor Relations,* 1949 WASH. U.L.Q. 54, 57-58; Note, 135 A.L.R. 79 (1941).

7. For detailed analyses of the various state statutes, see ZISKIND, LABOR ARBITRATION UNDER STATE STATUTES (1943); 4 CCH LAB. LAW REP. ¶¶ 43,505, 43,510 (4th ed.).

8. Davey, *Hazards in Labor Arbitration,* 1 IND. & LAB. REL. REV. 386, 394 (1948). It is interesting that as early as 1902, Samuel Gompers wrote: "The organized labor movement in our day is an assertion of the principle that there is no hope that the workers can protect their interests . . . unless they organize; unless they advocate conciliation . . . and declare for arbitration with their employers upon any disputed points upon which they cannot agree." *The Limitations of Conciliation and Arbitration,* 20 ANNALS 29, 31 (1902). But Gompers also said, "As a rule, men do not care to refer matters in which they are particularly and financially interested to what are usually termed disinterested parties." *Ibid.*

I. CONTRACTS AND DISPUTES

There are four general arrangements in labor arbitration contract provisions: (1) all disputes subject to arbitration, whether or not under the contract; (2) all disputes covered by the contract; (3) all disputes except those specifically exempted; and (4) only those types of disputes specifically listed.[9] Quite obviously the power of the arbitrator is derived from the contract, in voluntary arbitration. Or to state it another way, the source of his power must be in the wishes of the parties. The words of the contract are the formal expression of those wishes. From the language of the decisions, it is clear that the courts and arbitrators seek to find the solutions to the problem of arbitrability in the words of the contract. But examination and analysis of a large number of decisions leads to the belief that the wording of the contract is not the most important differentiator of whether the particular problem is arbitrable. In the first place, it is often most difficult to categorize the various contract provisions; and even were this task simpler, once the category is established, it is even more difficult to decide whether the particular dispute fits the category. It is suggested that attempts to explain decisions in terms of contract provisions have only added to the confusion already existing. While the courts and the arbitrators, ostensibly, fit the dispute into (or out of) the contract terms, more can be accomplished, in terms of rationalizing, by examining the decisions according to the various types of disputes than by examining them according to the contract terms.[10] As will be shown later, all the difficulties of contract interpretation are present—and in addition, underlying philosophies, concepts, and policies make strict adherence to the terms of the contract all but impossible.

(1) *The Labor-Management Relationship Generally and Renewal and Change of Agreements.*—In *Northland Greyhound Lines, Inc. v. Amalgamated Association of Street, Electric Railway and Motor Coach Employees,*[11] the contract provided for termination of the contract, changes in the contract, and arbitration of questions relating to hours, wages and working conditions. The court held that "questions of amendment of a continuing contract are questions arising under the contract and if they pertain to hours, wages and working conditions are arbitrable . . . ."[12] On the other hand, it was held by a court that, "Whether the appellant was bound to employ at its New Jersey plant members of the respondent union was a debatable question

9. 5 P-H LAB. EQUIPMENT ¶ 60,137. For examples of arbitration clauses see 5 P-H LAB. EQUIPMENT ¶¶ 64,061, 64,067.

10. There is one exception; where the agreement merely says, "any dispute," "It doesn't confine the arbitrable questions to those treated by the contract." Defiance Button Co. v. Wholesale and Warehouse Workers Union, 10 L.A. 912 (N.Y. Sup. Ct. 1948).

11. 66 F. Supp. 431, 3 L.A. 887 (D. Minn.), *appeal dismissed,* 157 F.2d 329 (8th Cir. 1946).

12. 3 L.A. at 890. *Cf.* Note, 1949 WASH. U.L.Q. 73, 78.

which called for a decision as to the scope of the collective bargaining agreement between the parties. This question, we think, was for the court, not for the arbitrators."[13] In another case, the contract provided there would be no strike or lockout. All disputes were to be referred to representatives for investigation and adjustment. On the alleged violation of the no-strike clause, the appellate court stayed an action by the company for damages and ordered arbitration.[14] Where a contract provided for group insurance, with the employer required to furnish "such other information as may be required by the underwriting insurance company . . .," the court granted a motion to stay arbitration of the question whether the employer must permit an audit of its books.[15]

(2) *Discharge, Retirement and Suspension.*—Where a labor agreement provided for arbitration only as to the meaning and application of the contract, but said nothing about discharges, an arbitrator held that discharges were arbitrable. His grounds were that to hold otherwise would permit the company to violate the terms of the contract by the device of discharge. He said that the security of the worker is fundamental to the labor-management agreement; and to allow unilateral discharges would make this a nullity.[16] And probationary employees were held to be included in a clause providing for arbitration of discharge of "employees."[17] But the loss of work by certain employees, because the company closed down a department and contracted out the work, was held not to be arbitrable under a contract providing for arbitration of discharges.[18] In another contract, the employer reserved the sole right to dismiss employees in connection with changes in operations due to business exigencies. Certain window trimmers were fired, and nonunion men were hired to do the work. The court held that the discharges were not arbitrable.[19] Unless the contract specifically provides so, there can be no arbitration of disputes over the

13. Belding Heminway Co. v. Wholesale & Warehouse Workers' Union, 295 N.Y. 541, 68 N.E.2d 681, 10 L.A. 899 (1946).

14. Mencher v. B. & S. Abeles & Kahn, 274 App. Div. 585, 84 N.Y.S.2d 718, 11 L.A. 954 (1st Dep't 1948).

15. *In re* Sohmer and Co., 89 N.Y.S.2d 214, 12 L.A. 385 (Sup. Ct. 1949).

16. Torrington Co. v. Metal Products Workers Union, 13 L.A. 209 (Conn. Sup. Ct. 1949); *In re* Standard Oil Co. *and* Central States Petroleum Union, 14 L.A. 516 (Arb. 1950); *In re* The Atwater Manufacturing Co. *and* United Steelworkers of America, 13 L.A. 747 (Arb. 1949). *Contra:* Goldberg v. Dowd, 9 L.A. 1027 (N.Y. Sup. Ct. 1948).

17. *In re* F.L. Jacobs Co. *and* United Automobile Workers of America, 11 L.A. 652 (Arb. 1948).

18. *In re* Berger, 191 Misc. 1043, 78 N.Y.S.2d 528, 9 L.A. 1045 (Sup. Ct.), *aff'd Mem.*, 274 App. Div. 788, 81 N.Y.S.2d 195 (1st Dep't 1948).

19. Oppenheim, Collins and Co. v. Display Union, 73 N.Y.S.2d 673, 8 L.A. 1080 (Sup. Ct. 1947) (but under another clause of the contract, arbitration ordered as to the non-union men who were hired).

pensioning or retiring of employees.[20] On the other hand, suspensions are generally held to be arbitrable.[21]

(3) *Wages, Incentives, Overtime and Bonuses.*—Although a contract may provide for reopening of a contract and renegotiation of wages, arbitration will not be ordered without more specific stipulation.[22] Even if arbitration is provided for merit wage increases, this does not include general wage increases.[23] There is disagreement whether the fixing of a rate of pay for new job classifieations is arbitrable under general contract provisions.[24] Incentive systems have been held subject to arbitration, even where the wage structure is specifically exempted from arbitration;[25] and questions of whether overtime rates are to be applied to specific situations are arbitrable,[26] but in the absence of express stipulation, the payment of a bonus is not arbitrable.[27]

(4) *Vacations, Welfare and Pensions.*—The New Hampshire Supreme Court has held that vaeation pay constitutes wages and is arbitrable under a contract clause calling for arbitration of wage disputes.[28] But a New Jersey appellate court ruled that whether certain employees were entitled to vacations was not arbitrable because the employees did not qualify for the va-

20. American Federation of Grain Millers v. Allied Mills, Inc., 196 Misc. 517, 91 N.Y.S.2d 732, 12 L.A. 485 (Sup. Ct. 1949); General Electric Co. v. United Radio Workers, 12 L.A. 1081 (N.Y. Sup. Ct. 1949); Grocery Warehousemen v. Kroger Co., 97 Pitts. L.J. 157, 12 L.A. 334 (Pa. C.P. 1949), *aff'd,* 13 L.A. 791 (Pa. Sup. Ct. 1950).

21. Rogers Diesel & Aircraft Corp. v. U.A.W., 2 L.A. 42 (N.Y. Sup. Ct. 1945); Tide Water Oil Co. v. Oil Workers Union, 235 S.W.2d 534, 14 L.A. 81 (Tex. Civ. App. 1950); *In re* Commercial Pacific Cable Company *and* American Communications Association, 11 L.A. 219 (Arb. 1948).

22. Towns & James, Inc., v. Barasch, 197 Misc. 1022, 96 N.Y.S.2d 32, 14 L.A. 293 (Sup. Ct.), *aff'd mem.* 277 App. Div., 857, 98 N.Y.S.2d 212 (1st Dep't 1950); *In re* Berger, 191 Misc. 870, 79 N.Y.S.2d 490, 9 L.A. 1048 (Sup. Ct.), *aff'd mem.,* 274 App. Div. 789, 81 N.Y.S.2d 196 (1st Dep't 1948); McCarten v. Brooklyn Bridge Freezing & Cold Storage Co., 81 N.Y.S.2d 494, 10 L.A. 382 (Sup. Ct. 1948); *In re* Ford Instrument Co., 8 L.A. 1064 (N.Y. Sup. Ct. 1947). *Contra:* United Electrical, Radio, and Machine Workers of America v. National Pneumatic Co., 134 N.J.L. 349, 48 A.2d 295, 4 L.A. 836 (Sup. Ct. 1946); *In re* The Lincoln Dairy Co. and Farmers Cooperative, Inc. *and* International Brotherhood of Teamsters, 14 L.A. 1055 (Arb. 1950).

23. United Electrical, Radio & Machine Workers of America v. Walter Kidde & Co., Inc., 136 N.J.L. 544, 57 A.2d 54, 14 Lab. Cas. ¶ 64,335 (Sup. Ct. 1948).

24. *Compare In re* Continental Carbon Co. *and* Oil Workers International Union, 12 L.A. 676 (Arb. 1949) *with In re* Bliss & Laughlin, Inc. *and* United Steel Workers of America, 11 L.A. 858 (Arb. 1948).

25. Sklar Mfg. Co. v. Fay, 11 L.A. 1022 (N.Y. Sup. Ct. 1949); *cf. In re* Simonds Worden White Company *and* International Union of Electrical, Radio & Machine Workers of America, 14 L.A. 365 (Arb. 1950). *Contra:* Gould Storage Battery Corp. v. United Electrical Workers, 11 L.A. 322 (N.J. Sup. Ct. 1948).

26. Store Employees v. Safeway Stores Inc., 79 N.Y.S.2d 493, 9 L.A. 1042 (Sup. Ct. 1948), *aff'd mem.,* 274 App. Div. 779, 81 N.Y.S.2d 142 (1st Dep't 1948); *accord,* Thomasville Chair Co. v. United Furniture Workers of America, 233 N.C. 46, 62 S.E.2d 535 (1950).

27. International Ass'n of Machinists v. Cutler-Hammer, Inc., 271 App. Div. 917, 67 N.Y.S.2d 317, 6 L.A. 1031 (1st Dep't), *aff'd mem.,* 297 N.Y. 519, 74 N.E.2d 464 (1947).

28. Brampton Woolen Co. v. Local Union, 61 A.2d 796, 15 Lab. Cas. ¶ 64,815, 11 L.A. 487 (N.H. 1948).

cations, by the terms of the contract.[29] In the absence of specific provisions, welfare and pension plans are not arbitrable.[30]

(5) *Scheduling of Work, Hours, Number of Employees, etc.*—Where a contract provided that there must be no discharge except for just cause, the court held that unemployment resulting from the abandonment of a department was not a proper subject for arbitration.[31] But arbitrators have held that the length of rest periods[32] and a requirement that workers punch in early are arbitrable.[33] Under a general arbitration clause, a court ruled that a dispute involving working hours was arbitrable, saying: "If it covers broadly a given field, the mere failure to foresee every possible contingency should not be treated as a purposeful exclusion of the unforeseen contingency from the operation of the agreement and its arbitration. . . ."[34] Likewise, it was held that a union's refusal to issue "shift hour permits" was arbitrable.[35] Although a contract provided that management would retain the right to the direction and disposition of the working forces, an arbitrator held that the question of how many workers should be in crews was arbitrable;[36] and the retiming of jobs has been held to be arbitrable under a general arbitration clause.[37] A question of whether a plant should be closed when business slackened also was held to be arbitrable.[38]

II. Underlying Principles, Stated and Implicit

From the foregoing, it can be seen that there is little consistency in the court (or arbitration) holdings. But there are some general principles which are helpful in understanding the decisions. Perhaps, the most important over-all limitation on the power of the arbitrator in a given situation,

29. Textile Workers Union v. Firestone Plastics Division, 6 N.J. Super. 235, 70 A.2d 880, 14 L.A. 129 (App. Div. 1950).

30. Publisher's Ass'n v. Simons, 196 Misc. 888, 93 N.Y.S.2d 782, 13 L.A. 637 (Sup. Ct. 1949); *cf.* General Electric Co. v. United Electrical Radio & Machine Workers of America, 300 N.Y. 262, 90 N.E.2d 181, 13 L.A. 899 (1949).

31. B.F. Curry, Inc. v. Reddeck, 194 Misc. 527, 86 N.Y.S.2d 674, 12 L.A. 290 (Sup. Ct. 1949); *cf.* Carborundum Co. v. Wagner, 198 Misc. 24, 96 N.Y.S.2d 278, 14 L.A. 362 (Sup. Ct., *aff'd mem.*, 277 App. Div. 941, 98 N.Y.S.2d 774 (4th Dep't 1950).

32. *In re* Western Electric Co. *and* Communications Workers of America, 14 L.A. 262 (Arb. 1950).

33. *In re* National Lock Co. *and* U.A.W., 12 L.A. 221 (Arb. 1949).

34. Store Employees v. Safeway Stores, Inc., 79 N.Y.S.2d 493, 497, 9 L.A. 1042 (Sup. Ct.), *aff'd mem.*, 274 App. Div. 779, 81 N.Y.S.2d 142 (1st Dep't 1948).

35. Association of Master Painters v. Brotherhood of Painters, 64 N.Y.S.2d 405, 3 L.A. 898 (Sup. Ct.), *aff'd mem.*, 271 App. Div. 868, 66 N.Y.S.2d 626 (1st Dep't 1946).

36. *In re* Youngstown Sheet & Tube Co. *and* United Steelworkers of America, 12 L.A. 865 (Arb. 1949) (but grievance dismissed on the merits).

37. Colt's Industrial Union v. Colt's Mfg. Co., 137 Conn. 305, 77 A.2d 301, 14 L.A. 45 (1950).

38. *In re* Selby Shoe Co. *and* United Shoe Workers of America, 12 L.A. 616 (Arb. 1949).

as revealed in decisions, is the concept of "inherent rights of management."[39] Yet, today, the courts are balancing the "rights of management" against the "underlying purpose to establish peaceful relations" in industry.[40]

A related limitation of the arbitrator is the doctrine that, for reasons of economic function of the industrial plant, certain prerogatives must be given to (or retained by) management. It is stated that both labor and management benefit from a reservation of the "managerial function" to those in managerial positions. One court followed this concept almost specifically in reasoning that, since the company was in a highly competitive business, and ability to compete depends on the ability and skill of management, "The Union must have recognized this, else it would not have consented to the section referring to the rights of management . . . being put into the agreement."[41]

Another restriction on the jurisdiction of the arbitrator is "public policy." Public policy is important in two respects: (1) consideration of whether disagreement and a work stoppage would be dangerous to the public interest, or whether the courts should adhere more to *laissez faire* principles as resulting in greater public gain in the long run; and (2) consideration of whether allowing an arbitrator to decide a given dispute would be against the public interest (*e.g.*, a dispute over a closed shop—in the light of the NLRA). "Where a formulation of public policy exists, the arbitrator can neither ignore nor by an award nullify that public policy."[42]

"Intent of the parties" is becoming more and more the basis for decisions by the courts.[43] Some courts say they follow the intent of the parties—but only if the intent is expressed in the contract.[44] On the other hand,

39. *Cf.* Colt's Industrial Union v. Colt's Mfg. Co., 137 Conn. 305, 77 A.2d 301, 14 L.A. 45 (1950).

40. Store Employees v. Safeway Stores, Inc., 79 N.Y.S.2d 493, 497, 9 L.A. 1042, 1044 (Sup. Ct.), *aff'd mem.*, 274 App. Div. 779, 81 N.Y.S.2d 142 (1st Dep't 1948); B.F. Curry, Inc. v. Reddeck, 194 Misc. 527, 86 N.Y.S.2d 674, 676, 12 L.A. 290, 291 (Sup. Ct. 1949); Latter v. Holsum Bread Co., 108 Utah 364, 160 P.2d 421, 424 (1945). *But see In re* Bliss & Laughlin, Inc. *and* United Steel Workers of America, 11 L.A. 858, 861 (Arb. 1948) (fact that management clause did not reserve right to set rates for new jobs not constitute a withdrawal of such right from management).

41. Carborundum Co. v. Wagner, 198 Misc. 24, 96 N.Y.S.2d 278, 283, 14 L.A. 362 (Sup. Ct.), *aff'd mem.*, 277 App. Div. 941, 98 N.Y.S.2d 774 (4th Dep't 1950); *cf.* Cox and Dunlop, *Regulation of Collective Bargaining by the National Labor Relations Board*, 63 HARV. L. REV. 389, 427 (1950).

42. 16 BROOKLYN L. REV. 128, 130 (1950); *cf.* Western Union Tel. Co. v. American Communications Ass'n, 299 N.Y. 177, 86 N.E.2d 162 (1949). *But cf.* Latter v. Holsum Bread Co., 108 Utah 364, 160 P.2d 421 (1945). See Summers and Samoff, *The Labor Board Looks at Arbitration*, 2 LAB. L.J. 329 (1951).

43. American Federation of Grain Millers v. Allied Mills, Inc., 196 Misc. 517, 91 N.Y.S.2d 732, 12 L.A. 485 (Sup. Ct. 1949); *In re* The Lincoln Dairy Co. *and* International Brotherhood of Teamsters, 14 L.A. 1055 (Arb. 1950).

44. Association of Master Painters v. Brotherhood of Painters, 64 N.Y.S.2d 405, 3 L.A. 898 (Sup. Ct.), *aff'd mem.*, 271 App. Div. 868, 66 N.Y.S.2d 626 (1st Dep't 1946); Towns & James, Inc. v. Barasch, 197 Misc. 1022, 96 N.Y.S.2d 32, 14 L.A. 293 (Sup. Ct.), *aff'd mem.*, 277 App. Div. 858, 98 N.Y.S.2d 212 (1st Dep't 1950).

an arbitrator held that, if it had been the intent of the parties to exclude the controversy from arbitration, they could have said so; thus, the controversy was arbitrable.[45]

One court held that the words of the contract must be construed in the light of what the words meant to the parties;[46] and another court held that the use of the words "arbitrate" or "arbitration" are not necessary to show that the parties intended the matter to be arbitrable.[47] In ascertaining the intent of the parties, the court will look to the conduct of the parties,[48] including the negotiations of the parties leading to the contract.[49] Also important are the past practices of the company[50] and the custom and practice in the industry.[51]

The above principles, in themselves, are not sufficient to afford a clear understanding of the court decisions. Instead, it is necessary to look back of the stated principles to more basic concepts—and to other, unstated, principles. First, consideration should be given to the nature of collective bargaining and arbitration, with an examination of the "rights" so much talked of in the cases.

With the industrial revolution, there arose the concept of ownership of a relationship—*i.e.*, means of production. One of the incidents of such ownership is the right to determine production policy.[52] Recognition of the philosophy of such rights in a relationship can explain the laws which were passed to prevent the organization of workers, and the use of injunctions by the courts to prevent concerted action by workers.

Of course, the conflict between the individual worker and management was uneven. The workers tried to overcome this disadvantage by furtive,

45. *In re* Western Electric Co. *and* Communications Workers of America, 14 L.A. 262, 266 (Arb. 1950).

46. Brampton Woolen Co. v. Local Union, 95 N.H. 255, 61 A.2d 796, 797, 15 Lab. Cas. ¶ 64,815, 11 L.A. 487, 488 (1948).

47. Mencher v. B. & S. Abeles & Kahn, 274 App. Div. 585, 84 N.Y.S.2d 718, 721, 11 L.A. 954, 955 (1st Dep't 1948).

48. Grocery Warehousemen v. Kroger Co. 97 Pitts. L.J. 157, 12 L.A. 334 (Pa. C.P. 1949), *aff'd* 13 L.A. 791 (Pa. Sup. Ct. 1950).

49. General Electric Co. v. United Radio Workers, 196 Misc. 143, 91 N.Y.S.2d 724, 12 L.A. 1081 (Sup. Ct. 1949).

50. *In re* Simonds Worden White Company *and* International Union of Electrical Radio & Machine Workers of America, 14 L.A. 365 (Arb. 1950); *In re* Standard Oil Co. *and* Central States Petroleum Union, 14 L.A. 516 (Arb. 1950).

51. Torrington Co. v. Metal Products Workers Union, 13 L.A. 209 (Conn. Super. Ct. 1949). *But cf.* Western Union Tel. Co. v. American Communications Ass'n, 299 N.Y. 177, 86 N.E.2d 162 (1949), 16 BROOKLYN L. REV. 128, 63 HARV. L. REV. 347 (no resort to interpretation where the language of the contract is clear).

52. Another incident of ownership of business was that the owner could protect the business relationship by any means which did not violate the old tort or new contract laws. When the individual worker left the relationship, the business was not materially harmed or even altered. But when the workers organized, their concerted action was a direct threat to the business relationship itself; thus, such concerted action was a violation of the rights incident to ownership of business, as it would destroy the relationship.

and sometimes illegal, resort to collective economic pressure.[53] This collective pressure was only a collection of individual pressures until there arose a new and more abstract concept, the concept of collective bargaining. This new concept can be shown by, *e.g.*, the NLRA and the language used in the *Jones and Laughlin* case.[54]

Furthermore, we can look at collective bargaining, realistically, only as a contract between two entities, for the benefit of third persons (the workers).[55] In the new relationship, there are three units: the owner (or management), the individual worker, and the workers' bargaining agent.[56] Some employers have refused to bargain collectively, not only because they have wanted to avoid the consequences, but also because they have failed to realize the full significance of the new conceptualistic relationship.

Even where there is bargaining, the concept of inherent rights of management is a tremendous force. In the National Labor-Management Conference of 1945, management and labor representatives could not agree on what was properly subject to arbitration. Management's position was that the following should be left to management: (1) determination of products to be manufactured or services to be rendered; (2) location of business and establishment of new units; (3) layout and process (subject to safety measures); (4) financial policies and prices; (5) management organization and selection for promotion to supervisory positions; (6) determination of job content, size of work force and assignment of work; and (7) determination of safety and property protection methods, where legal responsibility of the employer is involved. The management committee members held that discharge, seniority provisions, disciplinary penalties, "and such other

53. "In the early common law, labor organizations were regarded as criminal conspiracies and any demands made by such groups were regarded as unlawful and criminal attempts at extortion." UPDEGRAFF AND MCCOY, ARBITRATION OF LABOR DISPUTES 19 (1946); *cf.* Note, 2 VAND. L. REV. 441, 442 (1949).

54. "Employees have as clear a right to organize and select their representatives for lawful purposes as the respondent has to organize its business and select its own officers and agents." NLRB v. Jones & Laughlin Steel Corporation, 301 U.S. 1, 33, 57 Sup. Ct. 615, 81 L. Ed. 893 (1937).

"For human interests will assert themselves continually in new ways and significant institutions of every-day life often arise extra-legally and produce their most important results independent of or even against the law. For example, the law of contracts, the law of master and servant, the law of voluntary associations and the law of public service have but little relation to the actualities of modern industry, in which the laborer, or rather the group of laborers, has a vested right in the job not arising out of contract, which is not lost during a strike, in which the conditions of employment are not fixed by law nor by the parties to the relation but by union rules, in which the relation is not individual but collective, in which bargains are made with and enforced on behalf of *de facto* entities that are not legal entities, and in which the obligations of public service do not apply to groups by which the most vital public services are in fact performed." Pound, *The Administrative Application of Legal Standards*, in A.B.A. REP. 445, 453 (1919).

55. Rentschler v. Missouri Pac. R.R., 126 Neb. 493, 253 N.W. 694, 699 (1934).

56. To govern the relationship there must be three contracts, all interrelated: between the owner and the individual worker, between the owner and the bargaining agent, and between the individual worker and the bargaining agent.

matters as may be mutually agreed upon" are properly subject to review by grievance procedures. Labor's position was that "It would be extremely unwise to build a fence around the rights and responsibilities of management on the one hand and the unions on the other. The experience of many years shows that with the growth of mutual understanding the responsibilities of one of the parties today may well become the joint responsibility of both parties tomorrow."[57] Gompers, long ago, said: "One of the greatest causes of the disturbance of industry, the severance of friendly relations between employer and employees, is the fact that the employers assume to themselves the absolute right to dictate and direct the terms under which workers shall toil. . . ."[58] However, labor is not alone in this view. Speaking for a large corporation, one employer said, "If another disagreement, of any nature, should arise, arbitration is the cure that has been provided. Why not? . . . Yes, democracy in business is practical."[59]

Of course, in the contract between management and labor, management gives up some of the rights of setting production policy, and the bargaining agent for the workers gives up the right to strike, either immediately or for a given period.[60] In other words, "Collective bargaining . . . is the substitution of bilateral for unilateral decisions in the field of labor-management relations."[61] The courts, for better or for worse, are beginning to pay less heed to "inherent rights" of management, and more to the bilateral nature of the agreement. Still it must be said that, in those fields about which management is reluctant to bargain, and about which the NLRA does not require bargaining, there is a tendency to find that the dispute is not arbitrable.[62] This is, perhaps, the most important thing for framers of collective agreements to remember.

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57. THE PRESIDENT'S NATIONAL LABOR-MANAGEMENT CONFERENCE OF 1945—SUMMARY AND COMMITTEE REPORTS 58-61 (U.S. Dep't of Labor 1946).
"In a survey of 216 companies, the National Industrial Conference Board found . . . that 129 contracts banned arbitration of any issues while others specifically excluded such matters as: the right to hire, promote and discipline, the right of management to determine policy, production and operation, discharges and layoffs, planning of production schedules, adequacy of hourly and incentive rates, and a variety of other issues." 5 P-H, LAB. EQUIPMENT ¶ 60,081.

58. Gompers, *The Limitations of Conciliation and Arbitration,* 20 ANNALS 29, 33 (1902).

59. Nunn, *A New Concept by Capital of Labor's Relationship in Industry,* in A.M.A. PERSONNEL SER. No. 32 (1938); *cf.* MATHEWS *et al.,* LABOR LAW CASES 84 (Temp. ed. 1950).

60. It is true that, from this contract, the individual worker derives certain benefits; likewise, the individual worker gives up certain rights; *e.g.,* the right to join with other workers in a strike. But this should not make us lose sight of the fact that the contract is between management and the bargaining agent (*i.e.,* that the individual worker is not a party to the contract).

61. Gregory, *The Collective Bargaining Agreement: Its Nature and Scope,* 1949 WASH. U.L.Q. 3; see Frey, *The Logic of Collective Bargaining and Arbitration,* 12 LAW & CONTEMP. PROB. 264 (1947).

62. Set out in some detail on p. 852 *supra.* For a decision that management may insist on a "management prerogative clause," see American National Ins. Co. v. NLRB, 187

Another basis for confusion in this field is the dispute as to the nature of arbitration.[63] Some persons would restrict the jurisdiction of the arbitrator on the ground that arbitration is a judicial process,[64] and he should not be allowed to "legislate" for the parties. This should not be serious ground for limiting arbitration; any analogy to the political scene must be differentiated in that there is much less reason for a "separation of powers." There is little danger that the arbitrator may obtain too much power, for he may be removed even if he is a permanent arbitrator. Furthermore, subsequent negotiations by the parties may overcome any inadvertent setting of policy by the arbitrator. It should also be remembered that setting policy in the labor relations field is not legislating in the ordinary sense, for it is accomplished by two opposing forces. Nevertheless, where the decisions are important ones to the parties involved, it is argued that the arbitrator must not go outside the provisions of the contract and establish policy—that policy making should be left to the parties by direct negotiations.[65] To state it another way, the arbitrator must be restricted to the "scope of the contract." There can be little disagreement with this statement; but a problem arises in interpreting the meaning of "scope of the contract." A phrase so general in its terms can be of little help in understanding the bounds of authority of the arbitrator. Unfortunately, language does not permit a more specific enunciation of those bounds. It seems clear that there must be some restriction on the authority of the arbitrator; but the phrase "scope of the contract" apparently has led courts away from realism in holding that, where the matter in controversy is not specifically set out in the contract, it is not arbitrable.[66] Though it is impossible to be more specific in the use of language, interpretation of the phrase should be much more liberal.

F.2d 307 (5th Cir. 1951); *cf.* Cox and Dunlop, *Regulation of Collective Bargaining by the National Labor Relations Board,* 63 HARV. L. REV. 389 (1950).

63. "[T]he major problem in labor arbitration today is, 'What is labor arbitration?'" Braden, *Problems in Labor Arbitration,* 13 Mo. L. REV. 143, 147 (1948).

64. See Sanders, *Types of Labor Disputes and Approaches to Their Settlement,* 12 LAW & CONTEMP. PROB. 211, 216 (1947); Braden, *Toward Effective Arbitration,* in 1950 ARBITRATION CASES INVOLVING FEDERATION OF GLASS, CERAMIC AND SILICA SAND WORKERS OF AMERICA 73 (Beard ed. 1951). But see Warren and Bernstein, *The Arbitration Process,* in *id.* at 91; Carlston, *International Arbitration in the Postwar World,* 13 Mo. L. REV. 133 (1948).

65. Gompers, *supra* note 58 at 31. *But see* Garman, *How Organized Labor can Cooperate with Managements,* in A.M.A. PERSONNEL SER. No. 44, (1940) (must be balanced against desire for industrial peace); *cf.* Towns & James, Inc. v. Barasch, 197 Misc. 1022, 96 N.Y.S.2d 32, 35, 14 L.A. 293, 294 (Sup. Ct.), *aff'd mem.* 277 App. Div. 858, 98 N.Y.S.2d 212 (1st Dep't 1950).

66. Publishers Ass'n v. Simons, 196 Misc. 888, 93 N.Y.S.2d 782, 13 L.A. 637 (Sup. Ct. 1949); United Electrieal Radio & Machine Workers of America v. Walter Kidde & Co., 136 N.J.L. 544, 57 A.2d 54, 14 Lab. Cas. ¶ 64,335 (Sup. Ct. 1948); Goldberg v. Dowd, 9 L.A. 1027 (N.Y. Sup. Ct. 1948); Colt's Industrial Union v. Colt's Mfg. Co., 137 Conn. 305, 77 A.2d 301, 14 L.A. 45 (1950).

In this connection, the collective agreement is something more than a mere contract. By one school of thought, it should not attempt to cover all aspects of the employer-employee relationship. The contract should be only a rough framework to be filled in by the grievance process and arbitration, and should be so regarded.[67] It would seem that this is necessary in the light of the almost infinite kinds of situations which may arise in the industrial relationship. If arbitration has any purpose at all, it is to promote peaceful labor-management relations. And when arbitration is refused on the ground of nonarbitrability, the workers in a plant are apt to react unfavorably.[68]

III. Courts v. Arbitration

Where the labor agreement calls for arbitration of disputes arising under the contract and for application and interpretation of the contract, there is some question whether the court is really taking away the function of the arbitrator in interpreting the contract itself.[69] There is no clear distinction between the procedural question of arbitrability and the substantive dispute itself;[70] but it has been held that, if the intent to arbitrate has not been clearly expressed in the contract, "neither party will be deprived of the constitutional right to seek redress in the courts . . . ."[71]

The result of this kind of thinking by the courts results in decisions like that in *General Electric Co. v. United Electric Radio & Machine Workers of America,*[72] where the company voluntarily established a pension plan based on the time for which employees were paid by the company. The contract was silent as to pensions, but provided that there would be no dis-

67. Gregory, *The Collective Bargaining Agreement: Its Nature and Scope,* 1949 Wash. U.L.Q. 3, 15-16.

68. "We have one such case, which stands out like a sore thumb. . . . [T]he arbitrator ruled that the case was not arbitrable—even while he went ahead and dealt with the merits of the case. . . . this award has cost, and will cost, the Company thousands of units of production through discontent of the workers, who firmly believe they were cheated." Beard, *Foreword* in 1950 Arbitration Cases Involving Federation of Glass, Ceramic and Silica Sand Workers of America v (Beard ed. 1951); *cf.* Mathews *et al.,* Labor Law Cases 377 (Temp. ed. 1950).

69. *See* Western Union Tel. Co. v. American Communications Ass'n, 299 N.Y. 177, 86 N.E.2d 162, 169 (1949) (dissent), 16 Brooklyn L. Rev. 128, 63 Harv. L. Rev. 347. *But cf. In re* Berger, 191 Misc. 870, 79 N.Y.S.2d 490, 491, 9 L.A. 1048, 1049 (Sup. Ct.), *aff'd mem.,* 274 App. Div. 789, 81 N.Y.S.2d 196 (1st Dep't 1948): "The court is required to determine whether, under a fair and reasonable interpretation of the agreement, the parties intended that a dispute . . . was to be arbitrated." Also see, Belding Heminway Co. v. Wholesale & Warehouse Workers Union, 295 N.Y. 541, 68 N.E.2d 681, 10 L.A. 899 (1946).

70. *Cf. In re* Dictograph Products, Inc. *and* United Electrical, Radio and Machine Workers of America, 8 L.A. 1033, 1038 (Arb. 1947); Textile Workers Union v. Firestone Plastics Division, 6 N.J. Super. 235, 70 A.2d 880, 14 L.A. 129 (App. Div. 1950).

71. Association of Master Painters v. Brotherhood of Painters, 64 N.Y.S.2d 405, 409, 3 L.A. 898, 900 (Sup. Ct.), *aff'd mem.,* 271 App. Div. 868, 66 N.Y.S.2d 626 (1st Dep't 1946).

72. 300 N.Y. 262, 90 N.E.2d 181, 13 L.A. 899 (1949).

crimination for union activities. The question in the case involved the arbitrability of a refusal by the company to allow pension time credit for time spent in union activities, beyond the hours for which the company had agreed to pay. (Note that the company was paying for part of the time spent in union activities.) The court held that the question was not arbitrable, saying, "There is no possible basis for a charge of discrimination, and by that token, no possible ground for arbitration."[73] It seems that to hold there was no discrimination must, necessarily, be to decide on the merits. This is brought out more clearly by the language of the lower court in the same case: "the parties have agreed by the arbitration clause to reserve to the arbitrators any question affecting the application or interpretation of the contract . . . . there is no question as to the scope of the contract."[74]

The problem is also brought out by the dissent in *In re International Association of Machinists:* "A claim may be 'so unconscionable . . .' as to justify the Court in refusing to order the parties to proceed to arbitration . . . but I do not so regard the claim here asserted. . . . If there is a possibility of such a construction [of the contract, in favor of the claimant], the Court should not remove the controversy from the sphere of arbitration. . . ."[75] If a court, on reviewing an award, arrives at its own interpretation of the contract and sets aside the award on the ground that it is a modification of the contract, "the court's action seems seriously to impair the usefulness of arbitration proceedings."[76] These things should be borne in mind when considering that, for a long time, there has been a trend away from the courts toward arbitration and conciliation.[77]

Another question which must be faced, is whether the courts should act in advance of the arbitrator to decide arbitrability. It is argued that the question often would be moot for the courts, if the arbitrator were allowed to decide initially. Also, it is argued that, since the parties voluntarily have entered into the contract, the arbitrator should be required only to be "reasonable" in reaching his decision on the question of arbitrability—that the courts should only review his decision as to reasonableness, instead of deciding the question of arbitrability on its merits. As a general rule, the courts

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73. 90 N.E.2d at 182, 13 L.A. at 900. Also see *In re* Berger, 191 Misc. 1043, 78 N.Y.S.2d 528, 9 L.A. 1045 (Sup. Ct.), *aff'd mem.*, 274 App. Div. 788, 81 N.Y.S.2d 195 (1st Dep't 1948).

74. 86 N.Y.S.2d 581, 583, 11 L.A. 1020, 1021 (Sup. Ct. 1949).

75. 297 N.Y. 519, 74 N.E.2d 464, 7 L.A. 959 (1947).

76. 63 HARV. L. REV. 347 (1949). See Mosaic Tile Co. *and* Zanesville Local No. 79, reported in 1950 ARBITRATION CASES INVOLVING FEDERATION OF GLASS, CERAMIC AND SILICA SAND WORKERS OF AMERICA 22 (Beard ed. 1951).

77. Latter v. Holsum Bread Co., 108 Utah 364, 160 P.2d 421, 424 (1945); *cf.* Scoles, *Review of Labor Arbitration Awards on Jurisdictional Grounds,* 17 U. OF CHI. L. REV. 616, 623 (1950).